Ask the Probate Judge—Oaths and Stepped-Up Basis

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Q: Your last column said that you administered oaths to personal representatives who are appointed in other states, but live in New Mexico and need to be sworn in before performing their duties. I thought your powers were limited to Bernalillo County?

Your question is very astute. When I administer oaths to personal representatives who have been appointed in other states, the court in the other state sends paperwork that authorizes me to administer the oath. When the personal representative appears before me, I verify his or her identity, administer the oath or affirmation, and have the personal representative sign the appropriate paperwork. Then I sign and affix the court seal onto the document.

After the oath is administered, our court, rather than the personal representative, is required to send the paperwork back to the other court, which retains jurisdiction of the original case. I merely administer the oath to the personal representatives who are swearing that they will faithfully perform their duties.

It is true that my powers are limited. The Bernalillo County Probate Court may accept cases for decedents who died while domiciled in Bernalillo County or for certain out-of-state decedents who owned property within Bernalillo County. Probate judges may also perform weddings within their county limits.

Further, my jurisdiction as a judge extends to informal, uncontested cases only. If a case starts out uncontested and then issues arise that family members or creditors cannot resolve without litigation, the case must be transferred to the district court for further proceedings. This happens infrequently; about 1% of the cases filed each year in our court are transferred to the district court.

Q: When a spouse inherits a house as the surviving joint tenant, does the spouse receive a stepped-up basis on half of the value of the house? Thank you.

New Mexico is a community property state. In many non-community property states, only one-half of the value of joint tenancy property is stepped up at the death of the first spouse. But our law says that if spouses hold property in joint tenancy or as community property, the *entire* basis of the property is stepped up to fair market value upon the death of the first spouse.

For example, suppose a couple paid $40,000 for a house that is worth $150,000 at the death of the first spouse. In New Mexico the house would be stepped up in value to $150,000.

If the property were held in the surviving spouse's sole name, upon the death of the surviving spouse, the house would be stepped up again in value. If the house were then worth $200,000, it would be stepped up to $200,000. If the heirs or devisees sold the house soon after the death of the surviving spouse, they would probably owe no capital gains tax.

In New Mexico, for joint tenants other than spouses, only half of the value of the property is stepped up at the death of the first joint tenant, assuming each joint tenant paid an equal share of the property.

The Internal Revenue Code (IRC) also contains a capital gains income tax exclusion on the sale of a residence during the owner's lifetime. During one's lifetime, the IRC allows up to $250,000 of capital gain to be excluded from the sale of a residence. With limited exceptions, to qualify for this exclusion, the homeowner must own and use the home for at least two of the five years before the sale. If certain conditions are met, married couples can exclude up to $500,000 of capital gain when their residence is sold.